

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BRUCE H. ROSWICK	:	DETERMINATION
	:	DTA NO. 819930
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
and the New York City Administrative Code for the	:	
Years 1992, 1993, 1994, 1995 and 1996.	:	

Petitioner, Bruce H. Roswick, 500 East 85th Street, 6A, New York, New York 10028, filed a petition for a redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the years 1992, 1993, 1994, 1995 and 1996.

Pursuant to 20 NYCRR 3000.9(b) and by a notice of motion dated July 26, 2004 with a supporting affirmation, the Division of Taxation ("Division") moved for summary determination on the grounds that there were no material and triable issues of fact presented by the pleadings or supporting documents, and the facts mandated a finding in the Division's favor. Petitioner filed an affidavit in opposition to the motion on August 19, 2004, which date commenced the 90-day period for issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Barbara J. Russo, Esq., of counsel). After due consideration of the record, Gary R. Palmer, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner has demonstrated the existence of a material and triable issue of fact requiring the denial of the Division's motion.

FINDINGS OF FACT

1. During tax years 1992 through 1999, petitioner, a New York State and New York City resident, earned income and owed a New York State and New York City income tax liability in the total sum of \$92,720.72, exclusive of penalties and interest.

2. Petitioner failed to file New York State and New York City personal income tax returns for the years 1992 through 1996.

3. On January 30, 2003 petitioner pled guilty in New York County Supreme Court to one count of repeated failure to file personal income and earnings tax returns, a class "E" felony, in violation of Tax Law § 1802(a). His plea was based on his admission that he failed to file returns for the three consecutive years 1994, 1995 and 1996.

4. On March 20, 2003 petitioner was sentenced to five years probation, a \$30,000.00 fine and to pay restitution to the New York State Department of Taxation and Finance in the sum of \$160,563.92. The restitution consisted of tax due in the sum of \$92,720.72, plus interest in the sum of \$67,843.20 computed through January 30, 2003.

5. The terms of the plea and sentence were set forth in a plea agreement dated January 30, 2003 and signed by petitioner, his attorney and the prosecutor. The agreement provided that petitioner would execute a confession of judgement in favor of the New York State Department of Taxation and Finance in the amount of \$183,744.12 and file New York State and New York City personal income tax returns for tax years 2000 and 2001, and pay the liability due thereon.

The agreement also provided that it was not binding on the New York State Department of Taxation and Finance, the State of New York or the New York City Department of Finance.

6. On January 30, 2003 petitioner executed an affidavit for judgement by confession in favor of the New York State Department of Taxation and Finance, confessing judgement in the sum of \$183,744.12, including interest and penalties under the Tax Law, and expressly authorizing the Department, as plaintiff, to “finally and irrevocably fix and assess and enter a judgement for said sum against me.”

7. On January 30, 2003 petitioner executed eight consents to tax pursuant to Tax Law § 681(f), one consent for each of the years from 1992 through 1999, and setting forth New York State and New York City income and earnings taxes, along with section 685(a)(1)(A) penalty for failing to file returns, plus interest computed through January 30, 2003, as follows:

Year	NYS/NYC tax	Penalty	Interest	Total
1992	\$16,848.13	\$ 4,212.04	\$17,619.83	\$ 38,680.00
1993	21,916.33	5,479.09	20,309.30	47,704.72
1994	13,571.85	3,392.96	10,718.39	27,683.20
1995	13,800.65	3,450.16	9,080.38	26,331.19
1996	4,928.66	1,232.17	2,591.39	8,752.22
1997	12,509.93	3,127.48	5,117.35	20,754.76
1998	3,639.56	909.90	1,153.94	5,703.40
1999	5,505.61	1,376.40	1,252.62	8,134.63
Totals	\$92,720.72	\$23,180.20	\$67,843.20	\$183,744.12

8. On June 23, 2003 or June 30, 2003 the Division issued five notices and demands for payment of tax due to petitioner as follows:

Year Ending	Date Issued	NYS/NYC Tax	Interest	Payments	Balance Due
12-31-92	6-23-03	\$16,847.20	\$17,887.42	\$600.00	\$ 34,134.62
12-31-93	6-30-03	\$21,923.80	\$20,704.55	00	\$ 42,628.35
12-31-94	6-23-03	\$13,447.01	\$10,813.13	00	\$ 24,260.14
12-31-95	6-30-03	\$13,661.62	\$ 9,079.09	00	\$ 22,740.71
12-31-96	6-23-03	\$ 4,916.48	\$ 2,645.25	00	\$ 7,561.73
totals		\$70,796.11	\$61,129.44	\$600.00	\$131,325.55

9. Each notice and demand includes a statement that informs petitioner that he is being assessed based on his sentence by the court to pay restitution to the New York State Department of Taxation and Finance, and that a separate notice of deficiency will be issued for fraud penalty.

SUMMARY OF THE PARTIES' POSITIONS

10. Petitioner maintains that he suffers from bipolar disease and suffered strokes in February 2001 and, as a consequence, was incapable of forming a specific intent to evade tax. Based on his afflictions, he plans to move to vacate the criminal court plea agreement, which, he states, when vacated will cause the consents to tax to fail, and because the Division's assessments are based solely on the consents to tax, when the consents fail, the assessments will follow. Petitioner further argues that the Division's reliance on the doctrine of collateral estoppel is misplaced because he pled guilty to the Tax Law felony rather than having been convicted after trial. He next contends that the Division is guilty of laches in that it knew where petitioner resided, yet neglected to demand that petitioner file his tax returns, all to petitioner's prejudice. Finally, petitioner asserts that the Division's claim for restitution has been discharged in bankruptcy.

11. The Division contends that petitioner's tax debt is not dischargeable in bankruptcy, that petitioner is collaterally estopped from challenging the tax debt at issue by reason of his plea and conviction in criminal court, and that having signed the consents to tax, he has waived his right to protest the underlying tax debt.

CONCLUSIONS OF LAW

A. 20 NYCRR 3000.9(b) provides, in part, as follows:

After issue has been joined . . . , any party may move for summary determination The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact.

B. Petitioner's assertion that the income taxes assessed by the Division for the years in question have been discharged in bankruptcy must fail. Aside from the fact that petitioner has not provided any documentary proof that he even filed a petition in bankruptcy, let alone listed the tax debts for the years at issue on such a petition, 11 USC § 523(a)(1)(B) prohibits the discharge of an individual debtor respecting a tax debt for which no return has been filed (*see, Matter of Levin*, Tax Appeals Tribunal, April 16, 1998).

C. Petitioner has stated his intention to apply, at some point in time, to vacate his guilty plea to the Tax Law felony, repeated failure to file returns. He then postulates that the consents to tax he signed will no longer be effective. The consents to tax are authorized by Tax Law § 681(f) which states that a taxpayer shall have the right, at any time, to waive the restrictions on assessment and collection of a deficiency by a signed notice, in writing, and filed with the Commissioner. The restrictions referenced are those set forth in Tax Law § 681(c) whereby

assessment and levy are deferred until the issuance of a notice of deficiency and the expiration of the time for filing a petition contesting the notice, or, where a petition has been timely filed, the determination thereof has become final.

D. Petitioner has not set forth any reason to conclude that the consents to tax signed by him, which read, in part, “consent is given to the tax collection/assessment of the above deficiency(s), together with interest . . .” are, in any manner, ineffective as a basis to fix petitioner’s liability for the tax deficiencies stated. In the Federal realm, the Internal Revenue Code (“IRC”) equivalent of Tax Law § 681(f) is the waiver of restrictions on assessment and collection of IRC § 6213(d), which, in *Webster v. Commissioner* (64 TCM 724), was described by the U.S. Tax Court as “a unilateral waiver of a defense by the taxpayer.” In *Webster*, the taxpayers asked the Tax Court to declare the waivers void, following a levy of their bank account, because their reliance on the advice of their tax return preparer was misplaced. Their motion was denied. Here, petitioner, himself a lawyer, was represented by counsel at the time he executed the consents to tax. Any issue he may have with the wisdom of the legal advice he received is properly a matter between his lawyer and himself.

E. The Division argues that petitioner is collaterally estopped from challenging the tax at issue based on his guilty plea and conviction. Petitioner responds that a restitution order, not litigated, has no collateral estoppel effect, and the consents to tax cannot be given any collateral estoppel effect because they were never actually litigated and determined in a prior action or proceeding. In *Matter of Cumberland Pharmacy, Inc. v. Blum* (69 AD2d 903, 415 NYS2d 898), the court stated that “[a] conviction founded on a plea (of guilty) establishes guilt as surely as one that results from a jury verdict” and “[a] conviction is conclusive proof of the underlying

facts upon which it rests and the defendant is estopped from relitigating those facts in any future proceeding.” Although no record of the colloquy made at the time of petitioner’s guilty plea is in the record, from his affidavit for judgement by confession petitioner openly admitted that he failed to file New York State and New York City income tax returns for the years 1992 through 1999, and, as a result, he owes the Tax Department \$183,744.12. This is the precise amount set forth in the consents to tax for tax, penalty and interest for the same span of years executed by petitioner on the date of the guilty plea.

F. The petition in this matter relates only to the five years 1992 through 1996. For these five years petitioner has consented to pay tax and interest, computed through January 30, 2003, exclusive of penalties, in the amount of \$131,384.91. The Division is only seeking tax plus interest computed through either June 23, 2003 or June 30, 2003, in the sum of \$131,325.55, a sum less than the amount petitioner previously agreed to pay.

G. Petitioner’s claim of laches on the part of the Division is utterly devoid of merit. Petitioner has the duty under Tax Law §§ 651(a) and 652(a) to timely file his income tax returns and pay the sums reported due therein. The Division has no duty under the Tax Law to remind petitioner of his responsibilities to file and pay.

H. There being no material and triable issues of fact requiring a hearing, the Division’s motion for summary determination is granted.

I. The Petition of Bruce H. Roswick is denied and the notices and demands for payment of tax due, issued by the Division, are sustained.

DATED: Troy, New York
November 18, 2004

/s/ Gary R. Palmer
ADMINISTRATIVE LAW JUDGE